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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-556

SID HARVEY, INC. AND SID HARVEY BROOKLYN CORP., *Petitioners,*

vs.

LOCAL 810, METALS, ALLOYS, HARDWARE FABRICATORS AND WAREHOUSEMEN, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Respondents.*

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INDEX.

PAGE

Interest of the Amicus Curiae 1
Reasons for Granting the Writ 3
Conclusion 9

Table of Cases.

Bachman Machine Company v. N. L. R. B., 266 F. 2d 599 (8th Cir. 1959) 3

Carpet, Linoleum Layers' Union No. 419 v. N. L. R. B., 429 F. 2d 747 (D. C. Cir. 1970) 6

Carpet, Linoleum Layers' Union No. 419 v. N. L. R. B., ____ F. 2d ____, 80 LRRM 3254 (D. C. Cir. 1972) ..4, 5, 6

Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (S. D. N. Y. 1948) 5

Fibreboard Paper Products Corp. v. N. L. R. B., 379 U. S. 203 (1964) 8

Haughton v. Woodworkers Local 5-40, 294 F. 2d 766 (9th Cir. 1961) 5

Local 742, Carpenters v. N. L. R. B., 444 F. 2d 895 (D. C. Cir. 1971) cert. den., 404 U. S. 985 (1972) 6

Los Angeles Newspaper Guild v. N. L. R. B., 443 F. 2d 1173 (9th Cir. 1971) cert. den., 404 U. S. 1018 (1972) 3, 5

Miami Newspaper Pressmen's Local No. 46 v. N. L. R. B., 322 F. 2d 405 (D. C. Cir. 1963) 3

Milk Drivers Local 584 (Old Dutch Farms, Inc.), 146 NLRB 509 (1964) enf'd 341 F. 2d 29 (2d Cir. 1965) .. 5

N. L. R. B. v. Business Machines Mechanics Local 459, 228 F. 2d 553 (2nd Cir. 1955), cert. den. 351 U. S. 962 (1956) 5

N. L. R. B. v. Carpenters Dist. Council, 184 F. 2d 60 (10th Cir. 1950), cert. den., 341 U. S. 947 (1951)..... 7

N. L. R. B. v. Denver Building and Construction Trades Council, 341 U. S. 675 (1951).....2, 4, 5

National Woodwork Manufacturers Assn. v. N. L. R. B., 386 U. S. 612 (1967)..... 2, 8

Roy, J. G. & Sons Co. v. N. L. R. B., 251 F. 2d 771 (1st Cir. 1958)..... 3

Sheet Metal Workers Local 233 v. Atlas Sheet Metal Co., 384 F. 2d 101 (5th Cir. 1967)..... 3

Teamsters Local 639 (Poole's Warehousing, Inc.), 158 NLRB 1281..... 3, 5

Teamsters' Union v. Oliver, 358 U. S. 283 (1959)..... 8

Television and Radio Artists v. NLRB, 462 F. 2d 887 (D. C. Cir. 1972)..... 3

Truck Drivers Local 726 v. Empire State Express, Inc., 293 F. 2d 414 (5th Cir. 1961)..... 5

Truck Drivers Local 107 (Sterling Wire Products Co.), 137 N. L. R. B. 1330 (1962)..... 5

MISCELLANEOUS.

John M. Blair, Economic Concentration, Harcourt Brace Jovanovich 1972, pp. 257, et seq. 6, 7

Borus & Warshal, Neutrality and Secondary Boycotts: An Economic Evaluation of a Legal Question, 17 Lab. L. J. (1966) 7

Burck, The Merger Movement Runs High, Fortune, Feb. 1969, p. 79 6

Federal Trade Commission Report, Large Mergers in Manufacturing and Mining, 1948-1971, May 1972, pp. 7-23 6

Federal Trade Commission Report on Corporate Mergers and Acquisitions, May 1955, at pp. 116, et seq. ... 7

II Legislative History of the Labor-Management Relations Act, 1947, 1047-1048 (Comments of Senator Murphy) and *id.* at 1106 (Comments of Senator Taft) 4

Vaughn, Franchising Today (Farnsworth Publishing Co., Inc., 1969) 7

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INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of the United States of America (hereafter the "Chamber") files this brief *amicus curiae* to present its views upon a case of great importance in the administration of the National Labor Re-

*This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

lations Act.[1] The question raised in this case—whether *potential*, as opposed to *active*, common control is sufficient to destroy the Act's secondary boycott protections—is a matter of vital concern to the Chamber.

The decision of the Court of Appeals in this case significantly dilutes the secondary boycott safeguards afforded by Section 8(b)(4) of the Act. *First*, the court below not only rejected the active common management criterion of neutrality that heretofore has been utilized by the National Labor Relations Board and other courts of appeals, but, in lieu thereof, resurrected a congressionally discarded and unworkable "unity of interest" doctrine. *Second*, the ramifications of this new and unwarranted approach are far-reaching. A vast array of businesses, like the employers here, depend upon a variety of integrated business relationships to effectively compete. The result of sanctioning union pressures against related divisions or subsidiaries of a corporation, or even its outside suppliers or customers with whom it has substantial dealings, will inevitably be a failure to shield "unoffending employers and others from pressures in controversies not their own." *N. L. R. B.* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 692 (1951). *Finally*, the decision below represents the most recent in a series of opinions severely circumscribing the neutrality concept of *Denver Building Trades* allegedly predicated upon this Court's decision in *National Woodwork Manufacturers' Ass'n.* v. *N. L. R. B.*, 386 U. S. 612 (1967). The time is now ripe for a needed reconciliation of *Denver Building Trades* and *National Woodwork*. This case is a uniquely appropriate vehicle for that purpose.

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1. The Chamber is a business federation with a membership of over 3700 state and local chambers of commerce and trade associations, and an underlying membership of more than five million individual business men and business firms. It is the largest association of business and professional organizations in the United States.

As a principal spokesman for the American business community, the Chamber believes that its views and experience may be of assistance to the Court. It is for this reason that the Chamber respectfully submits this brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT.

1. Prior to the instant case, the Board and courts uniformly required that "actual common control of labor policies," not merely the potential control implicit in common ownership or economic interdependence, was required before two employers could be deemed a single enterprise for secondary boycott purposes.[2] Any broader rule would fail to achieve the dual congressional objectives—to "confine labor conflicts to the employer in whose labor relations the conflict has arisen, and to wall off the pressures generated by that conflict from unallied employers." *Miami Newspaper Pressmen's Local No. 46* v. *N. L. R. B.*, 322 F. 2d 405, 410 (D. C. Cir. 1963).

The decision below substitutes for a criterion of active common management[3] an unpredictable "common sense"

2. *J. G. Roy & Sons Co.* v. *N. L. R. B.*, 251 F. 2d 771, 773 (1st Cir. 1958). See also *Los Angeles Newspaper Guild* v. *N. L. R. B.*, 443 F. 2d 1173 (9th Cir. 1971), *cert. den.* 404 U. S. 1018 (1972); *Television and Radio Artists* v. *N. L. R. B.*, 462 F. 2d 887 (D. C. Cir. 1972); *Backman Machine Company* v. *N. L. R. B.*, 266 F. 2d 599 (8th Cir. 1959); *Sheet Metal Workers Local 233* v. *Atlas Sheet Metal Co.*, 384 F. 2d 101 (5th Cir. 1967); *Teamsters Local 639 (Poole's Warehousing, Inc.)*, 158 NLRB 1281.

3. If the Court of Appeals here had applied an active common management test, the result below would have been different. In this case, the picketed secondary employers ("Inc." and the three sales companies) exercised no actual control over the labor policies of the primary employer ("Supply Company"). The Board's finding that "each corporate president" of the separate corporations "was in sole charge of," and "actually conduct[ed] the day-to-day management of the corporation's business, includ-

analysis of the "relationship between the two employers who are being picketed." App. B, p. 37a. Under this approach, the Court of Appeals, whenever there exists *either* "centralized or overlapping" ownership *or* significant "economic interdependence" between two employers, would treat the concerns as a single employer for secondary boycott purposes. This view of the law, in addition to differing markedly from that followed by the Board and other courts, is a revival of the common law "unity of interest" doctrine which Congress rejected when it enacted Section 8(b)(4). Indeed, that Section was specifically added to the Act in 1947 to "reverse [the] trend" in which parties who were found "to possess a 'unity of interest' with the disputing employer" were embroiled in labor disputes in which they were "not immediately involved."[4]

2. The decision below also cannot be reconciled with *Denver Building Trades*. That case involved the question of whether a general contractor and his subcontractors on the same construction project should be treated as a single unified enterprise for secondary boycott purposes based on the close functional integration and economic interdependence inherent in their relationship. This Court resolved that issue by finding such factors insufficient to defeat the parties' separate neutrality status or to "make the employees of one the employees of the other." 341 U. S. at 690. Such "business relationships" are, as this Court

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ing its relations with its sources of supplies, its customers, its management of its personnel, and its labor relations", was not disturbed by the Court of Appeals. App. A. p. 7a; App. B. p. 34a. In fact, the picketed secondary companies were not involved in any respect in the decision to discharge the Supply Company supervisor —the incident which gave rise to the picketing. App. A, p. 3.

4. II Legislative History of the Labor-Management Relations Act, 1947, at 1047-1048 (Comments of Senator Murphy). See also *id.* at 1106 (Comments of Senator Taft) and *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, ... F. 2d ....., 80 LRRM 3254, 3256-7 (D. C. Cir. 1972).

observed, "too well established . . . to be overrridden without clear language doing so." *Id.* at 690. The *Denver Building Trades* rule—that functional integration is insufficient to involve separate employing entities in the disputes of the other—has subsequently been applied to a variety of interrelated[5] business relationships of both a horizontal[6] and vertical ("straight line") nature.[7]

The critical inquiry in each case, as well as in those instances involving the related "ally"[8] or "co-employer"[9] concepts, has been consistent: that a labor union should be entitled to bring pressure on only those persons who, in addition to the offending employer, actually determine their conditions of employment. Mere potential control has not, prior to the present case, been sufficient to extend the area of industrial conflict.

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5. See, e.g., *Haughton* v. *Woodworkers Local 5-40*, 294 F. 2d 766, 767 (9th Cir. 1961) and *Milk Drivers Local 584 (Old Dutch Farms, Inc.)* 146 N. L. R. B. 509 (1964), *enf'd.* 341 F. 2d 29 (2nd Cir. 1965).

6. See, e.g., *Teamsters' Local 639 (Poole's Warehousing, Inc.)*, and *Los Angeles Newspaper Guild* v. *N. L. R. B.*, *supra* n. 2.

7. See, e.g., *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, *supra* n. 4.

8. The "ally" doctrine applies where one employer agrees to perform "struck work" for the primary employer. Since the result of such activity is the same as if the primary employer had hired strikebreakers, the employer performing such work, in effect, stands in the shoes of the primary employer and is considered to be "firmly allied" in the primary's dispute. See, e.g., *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672, (S. D. N. Y. 1948) and *N. L. R. B.* v. *Business Machine Mechanics Local 459*, 228 F. 2d 553 (2nd Cir. 1955), *cert. den.* 351 U. S. 962 (1956).

9. The "co-employer" doctrine applies where two or more corporate entities have commonly controlled labor relations policies. Again, since the ostensibly neutral employer actually has control over the involved employees' working conditions, he is, in effect, an adjunct of the primary employer. See, e.g., *Truck Drivers Local 726* v. *Empire State Express, Inc.*, 293 F. 2d 414, 423 (5th Cir. 1961) and *Truck Drivers Local 107 (Sterling Wire Products Co.)*, 137 NLRB 1330 (1962).

3. The instant case is part of a recent effort to revive the concept of "economic realism." This trend, arising in a multiplicity of contexts,[10] has caused a severe dislocation in our national labor policy. Overlapping ownership[11] and substantial business dealings between interrelated com-

10. See, e.g., *Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B.*, 429 F. 2d 747 (D. C. Cir. 1970), a case relied on by the decision below and subsequently revised (*Carpet, Linoleum Layers' Union No. 419* v. *N. L. R. B., supra* n. 4), where the court remanded for the Board's consideration the neutrality status of an alleged secondary retailer in light of its "economic interest" in the outcome of a dispute involving employees of its independent, functionally integrated installers; and *Local 742, Carpenters* v. *N. L. R. B.*, 444 F. 2d 895 (D. C. Cir. 1971), *cert. den.* 404 U. S. 985 (1972), where the court's remand to the Board contained instructions to henceforth consider a boycotted employer, notwithstanding his lack of control over the union's underlying grievance, as an unprotected primary where he retains an "economic interest" in the subject of the dispute.

11. The consolidation of both related and unrelated business enterprises through mergers or acquisitions has undoubtedly had a greater impact in shaping our present-day modern industrial structure than any other single factor. See J. Blair, Economic Concentration (Harcourt Brace Jovanovich 1972) at 257 *et seq.* Impelled by large scale marketing factors, including the need for increased product diversification and sources of supply, the trend towards greater consolidation has increased markedly in the past decade. *Id.*, at 275 *et seq.* See also, Federal Trade Commission Stat. Rep. No. 9, Large Mergers in Manufacturing and Mining 1948-1971, May 1972, at 7-23. For example, the explosive emergence of the corporate conglomerate, where the aquiring company usually has very little in common with the acquired companies, has resulted in a ten-fold increase in the number of mergers from that extant in 1950. See Burck, *The Merger Movement Runs High*, Fortune (Feb., 1969), 79.

panies[12] and independent concerns[13] are commonplace in American industry. The decision in this case threatens to radically alter the secondary boycott protection afforded employers in each of these situations as well as analogous areas.[14] The instant case, in sum, does not represent a unique phenomena. The question presented is one which,

12. Common ownership of both horizontally and vertically integrated companies is characteristic of major segments of our economy including the steel, lumber, textile and retail food industries. Blair, *supra* n. 11, at 31 and 270 *et seq.* The history of mass production is replete with examples of concerns whose economic survival was dependent upon their ability to vertically integrate, backwards or forwards. Federal Trade Commission, Report on Corporate Mergers and Acquisitions, May, 1955, at 116, *et seq.* For example, a significant segment of the lumber industry consists of large paper manufacturers who are integrated backwards into logging and lumbering and, in some cases, forward into retailing or distribution. Blair, *supra* n. 11, at 271. These "captive" sources of supply or distribution represent major capital enterprises whose day-to-day operations and labor policies are independently established and administered free from the control of their parent corporation. *Ibid.*

13. Although the lower court's opinion occurred in the context of commonly owned entities, its "economic interdependence" rationale would apparently extend to business dealings between separately owned but closely related independent contractors which deal exclusively or primarily with a single business. A prime example is the burgeoning franchise industry where independent business concerns serve as the distributive or sales arm of existing manufacturing or retail concerns. See Vaughn, Franchising Today, (Farnsworth Publishing Co., Inc., 1969).

14. The "interest" between interrelated or functionally integrated concerns in each employer's labor disputes is often no different than that which exists between unionized employers in a horizontally organized industry (e.g., the trucking industry) where a union's success at one company will inevitably be followed by parallel demands on others. Similarly, a primary's customers or competitors will never be "wholly unconcerned" in the primary's labor disputes because of their direct economic stake in its outcome. See Borus & Warshal, *Neutrality and Secondary Boycotts: An Economic Evaluation of a Legal Question,* 17 Lab. L. J. 310 (1966). The courts have not, of course, removed the Act's secondary boycott protections in such relationships. See, e.g., *N. L. R. B.* v. *Carpenters Dist. Council,* 184 F. 2d 60 (10th Cir. 1950) *cert. den.* 341 U. S. 947 (1951).

as the petition correctly notes, is likely to recur in every case in which commonly owned companies perform complimentary functions.

4. The present case also represents an improper and far-reaching extension of *National Woodwork*. In that case, a five to four majority of this Court legitimatized a product boycott directed solely at an employing entity which actually controlled the assignment of the disputed work. The crux of the decision was the offending employer's statutory bargaining duty *vis-a-vis* his own employees; the "vortex . . . of the labor dispute" embraced a contractual restriction precluding the employer from subcontracting work traditionally performed by his employees which did not extend "to satisfy union objectives elsewhere." 386 U. S. at 627, 644. Cf. *Fibreboard Paper Prods. Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964); *Teamsters' Union* v. *Oliver*, 358 U. S. 283 (1959).

A neutrality test of active common management comports with *National Woodwork* by confining union pressure to the employer who actually controls the labor policies giving rise to the dispute. The decision below, on the other hand, extends the "vortex" of the dispute to entities elsewhere who have no contractual relationship with the involved employees and who did not make the offending managerial decision. The effect is to severely restrict management's contractual freedom. Such a result, coupled with the other significant ramifications of the instant case noted above, warrants review by this Court.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth by the Petitioner, the petition for writ of certiorari should be granted.

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